



Reasons for decision

Société Radio-Canada,

applicant,

and

Syndicat des communications de Radio-Canada
(FNC-CSN),

respondent.

Board File: 30356-C

Neutral Citation: 2014 CIRB 726

May 5, 2014

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I-Industrial Relations)* (the Code). A hearing in this matter was held on April 16, 2014, in Montréal, during which the Board heard the parties' respective submissions. No witnesses were heard.

Appearances

Mr. Alexandre W. Buswell, for the Société Radio-Canada;

Messrs. Benoît Laurin and Guy Martin, for the Syndicat des communications de Radio-Canada (FNC-CSN).

I. Nature of the Application

[1] The Société Radio-Canada (the Société) asked the Board to issue an interim order to temporarily suspend collective bargaining with the Syndicat des communications de Radio-

Canada

Canada (FNC-CSN) (the union) until the Board issued a decision regarding the application for review filed by the employer pursuant to section 18.1 of the *Code* (file no. 29449-C). The union objects to this application. The application for an interim order filed by the employer is related to the application for review of the structure of the bargaining units filed on May 31, 2012.

II. Background

[2] On May 30, 2012, the union gave the Société notice to bargain in relation to the renewal of the collective agreement in effect from March 30, 2009, to September 30, 2012. The notice to bargain was given pursuant to section 49 of the *Code*. Since that time, the parties have met on more than 40 occasions to hold bargaining sessions, either alone or with representatives of the Federal Mediation and Conciliation Service. To this day, no agreement has been reached by the parties with regard to the renewal of the collective agreement.

[3] On May 31, 2012, the Société filed an application for review of the structure of the bargaining units pursuant to section 18.1 of the *Code* (file no. 29449-C). That application for review filed by the Société with the Board affects in particular the bargaining unit represented by the union and three bargaining units of Radio-Canada's French-language network. The hearings related to the application for review of the structure of the bargaining units ended on January 30, 2014, and the written submissions were provided in their entirety on that date. However, no decision has yet been issued on this matter.

[4] A notice of dispute was also filed by the Société on September 12, 2013, with the Minister of Labour, pursuant to section 71 of the *Code*. The union objected to that request. On October 1, 2013, Mr. Guy Baron of the Federal Mediation and Conciliation Service informed the parties that the Société's request for conciliation was suspended until the Board issued a decision on the application for review filed by the Société pursuant to section 18.1 of the *Code*. The Minister of Labour moreover appointed two mediators pursuant to section 105 of the *Code*. Meetings were held with the mediators until mid-February 2014, but, as of today, no new collective agreement has been entered into. Several unfair labour practice complaints have been filed by the parties since the beginning of the bargaining phase. Those complaints, totalling ten in all, are pending before the Board.

III. Positions of the Parties

[5] The Société and the union have filed lengthy written submissions. For the sole purpose of the application for an interim order, and considering that the Board also heard the parties' arguments on April 16, 2014, the Board will summarize only the parties' main allegations.

A. The Société

[6] The Société alleges that the discussions between the parties have become essentially futile and useless in the present context. The Société notes that it has become clear, especially in recent weeks, that the current situation is not conducive to the conclusion of a new collective agreement, since the parties have, on the contrary, confirmed their widely divergent views.

[7] The Société alleges that even though the Minister has appointed mediators pursuant to section 105 of the *Code*, no developments or discussions have helped to resolve the dispute, and that it should therefore be acknowledged that the parties are at an impasse. The Société notes that bargaining began two years ago and has been suspended since February 2014.

[8] The Société further alleges that no leverage currently exists that could force the parties to reconsider their respective positions regarding the various issues identified in the bargaining process. The Société adds that no time frame has been set for the parties to resume bargaining. In that regard, the Société refers the Board to a document distributed by the union to its members on November 29, 2013, which includes the following statement: "so there is no real risk to rejecting the so-called comprehensive, final offer. We repeat, the employer does not have the right to lockout and we do not have the right to strike..." (translation). The Société emphasizes that the relations between the parties have become acrimonious, not to mention that it finds itself in a delicate financial situation, as was recently announced.

[9] The Société adds that in light of the application for review it has filed pursuant to section 18.1 of the *Code*, which is currently pending before the Board, and of the extremely difficult financial framework with which it is currently dealing, it must be acknowledged that the Société and the union cannot agree on what are and should be the real bargaining issues.

[10] The Société also states that further bargaining between the parties, when it has become relatively clear that it has no real chance of success, will result in a large number of complaints and proceedings before the Board, in addition to all of those already undertaken by both parties. It also states that further bargaining between the parties will only worsen the relations between them.

[11] In the Société's opinion, further bargaining between the parties in the current context would be contrary to the objectives of the *Code*, especially in that no progress or positive result between the parties can logically and rationally be foreseen at this time. The Société is therefore of the view that the temporary suspension of collective bargaining between the parties will help to resolve a major difficulty that currently exists between them, while pursuing the objectives of the *Code*.

[12] The Société thus alleges that it is in the interest of the Société, the union and the employees represented by the union that collective bargaining between the Société and the union be temporarily suspended, mainly to avoid a further worsening of relations between the parties. In its opinion, the objectives of the *Code* clearly militate in favour of the temporary suspension of bargaining so as to maintain industrial peace.

[13] The Société points out that even though the preamble of the *Code* advocates free collective bargaining, this in no way changes the situation of the parties, since collective bargaining broke down on February 17, 2014, and no bargaining has been announced. It also states that the decision of the Minister of Labour to suspend the employer's application for notice of dispute until the Board issued its decision on the structure of the bargaining units means that she wished to release the parties from the bargaining process set out in the *Code*, since it has the effect of depriving the parties of the right to lockout or strike, and thus of any leverage.

[14] The Société states that the Board has the jurisdiction required to issue the order that is being sought. While it acknowledges that the application does not fall within a context expressly provided for by the *Code*, the Société reiterates that it is important to grant its application for an interim order, for the purpose of limiting as much as possible the damage to and worsening of labour relations with the bargaining agent and the employees.

B. The Union

[15] The union is asking that the application to suspend collective bargaining filed by the Société be dismissed. In the union's opinion, the criteria in section 19.1 of the *Code* must be assessed keeping in mind the very foundations or principles of the *Code*, that is to say, free collective bargaining and constructive settlement of disputes. It points out that the obligation to bargain collectively is imposed on all parties under section 50 of the *Code*, and that no provision allows for the suspension of the obligation to bargain, under any circumstances. It adds that collective bargaining is part of its duty of fair representation to its members. The union is also of the view that the Société has not shown that irreparable harm would occur if the Board refused to issue an interim order to suspend collective bargaining.

[16] It alleges that the application for review filed by the Société pursuant to section 18.1 of the *Code* entails no immediate legal effect, temporary or permanent, until such time as the Board issues an order that would modify the composition of the bargaining units at the Société. The union points out that, in the meantime, it still has exclusive representation with respect to its certification and is bound by its rights and duties under the *Code*, including the duty to renew the collective agreement in good faith and to assume its responsibilities with respect to its duty of fair representation.

[17] It adds that the application for review of the structure of the bargaining units would not justify making such an order, especially since that application is currently pending before the Board and nothing has been decided in that regard. The union states that nothing is preventing the parties from resuming bargaining and reaching agreement on new working conditions. According to the union, if the Board issued an interim order to suspend collective bargaining, it would greatly prejudice both the bargaining agent and the employees it represents.

[18] The union also points out that the *Code* does not grant the Board the opportunity to suspend bargaining, and that if it did so, it would be exceeding its jurisdiction.

[19] With respect to the merits of the application for an interim order, the union responds to all of the allegations made by the Société in its application and alleges that nothing allows for or justifies suspending the bargaining between the parties. The union believes that suspending

bargaining is likely, on the contrary, to keep it at a disadvantage in relation to the other bargaining agents whose collective agreement had expired and who were offered a simple extension by the Société. According to the union, suspending bargaining would in no way facilitate the settlement of a dispute, and would have the contrary effect of exacerbating and further worsening the relations between the parties.

[20] The union concludes that even if the Board had the authority to exempt one party from its obligation to bargain, the Board should not exercise it pursuant to its discretion under section 19.1 because of the objectives of the *Code*, including those set out in the preamble of Part I.

IV. Analysis and Decision

[21] For the reasons that follow, the Board dismisses the employer's application for an interim order to **temporarily suspend** collective bargaining between the employer and the union until the Board issued its decision with respect to the application for review of the structure of the bargaining units.

[22] Section 19.1 of the *Code* provides:

19.1 The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

[23] The Board, in *Trentway-Wagar Inc.*, 2000 CIRB 57, relied on the applicable test for exercising its powers under section 19.1 of the *Code*. It stated that the common law three-stage test applied by the courts in connection with applications for interim orders may serve as a useful analytical guide, but that the power under section 19.1 of the *Code* should be interpreted and applied in a manner that reflects the intention and objectives of the *Code*. The Board explained the goals for an interim order in a labour relations context, noting among other things:

[32] As an example, an important goal for an interim order in a labour relations context may be that of expeditiously restoring the balance contemplated by the statute between the parties to encourage them to engage in free collective bargaining and the more constructive settlement of the matters in dispute between them. It frequently occurs that specific statutory violations arise in the labour context because of broader disputes underlying them. In the circumstances, the objectives of encouraging the parties to resolve more constructively their disputes through the broader process of collective bargaining may, in

the view of the Board, require an interim order that encourages the parties to do so rather than immediately addressing a more specific matter in issue.

[38] This is not to reject the analytical structure provided by the tests utilized by the courts, which will often provide a useful guide and framework for analysis. However, the Board must carefully consider what is appropriate for purposes of ensuring the fulfilment of the objectives of the *Code* because this is what the statute requires. This clearly requires the Board to consider the issues before it in the context of the labour relations realities in this situation and the purposes of Part I of the *Code*, including the encouragement of free collective bargaining and the constructive settlement of disputes.

[24] In that case, the union filed an application for an interim order pursuant to section 19.1. That application resulted from a complaint filed by the union under sections 94(1) and 94(3) of the *Code* following the dismissal of the local union president and chief spokesperson for the union's negotiating team, on the same day that he was re-elected while collective bargaining negotiations were ongoing. After analyzing the general objectives of the *Code* and the alleged violation of section 94(3), the Board granted the union's application for an interim order and ordered that the local union president be reinstated, since it was of the opinion that the president's dismissal could potentially have a serious adverse impact upon the collective bargaining process and could seriously undermine the union's ability to effectively continue to conduct collective bargaining negotiations.

[25] In that same matter, *Trentway-Wagar Inc.*, *supra*, the Board also stated the following:

[39] Careful attention must be directed not only to the broad objectives of the *Code*, but also to the statutory provisions alleged to be violated in the specific circumstances being considered and to their objectives. In this case, the provisions alleged to be violated should be considered in turn.

[26] In the present matter, however, the employer does not refer to any provision of the *Code* that may have been violated by the union. The application for an interim order was filed in anticipation of a decision issued in the context of an application for review of the structure of the bargaining units filed by the employer under section 18.1 of the *Code*.

[27] In *Air Canada*, 2000 CIRB 96 (*Air Canada*), the Board received an application for an interim order as a result of a review of the bargaining unit structure pursuant to section 18.1 following the merger of Canadian Airlines International with Air Canada (single employer application under section 35 of the *Code*). The union filed an application for an interim order directing Air Canada to cease and desist from breaching a memorandum of understanding it had

entered into with the union. The employer, Air Canada, argued that the Board had no jurisdiction to issue an interim order under section 19.1 and that the matter should be deferred to arbitration, since the matters at issue arose from an alleged failure to comply with a negotiated agreement in the nature of a collective agreement. On the issue of jurisdiction, the Board ruled:

[22] It is useful to commence consideration of the arguments of the parties with a consideration of the jurisdictional question. In the Board's view, it does have jurisdiction to consider the matters in question because **while not in response to an alleged violation of a statutory provision**, such an exercise of jurisdiction does respond to a statutory responsibility given to the Board in section 18.1 of the *Code*.

[24] Section 18.1 contemplates that following a consolidation of employers to form a single employer, it may become necessary that the relevant bargaining units be similarly consolidated or at least adjusted to the changed circumstances of the employer in accordance with its processes. In such a circumstance, although there **is not an alleged violation of the Code**, it is clear that the processes contemplated by section 18.1 of the *Code* are underway, that the parties to the present proceedings are involved in those proceedings and through them are seeking to have issues directly and obviously related to the subject matter of the request for interim declaration resolved.

(emphasis added)

[28] As to whether or not the Board should issue the interim order requested by the union, the Board ruled in *Air Canada, supra*:

[38] In consideration of the broad scope of the interim power now set out in section 19.1 of the *Code*, it becomes evident that the use of the interim power to address concerns that arise in the course of the conduct of a review pursuant to section 18.1 of the *Code* should not be viewed by parties as unusual or novel, and that the Board, in deciding whether an interim power should be exercised, should not defer to arbitration where an interim order is necessary to support its functions under section 18.1.

[39] In the circumstances, it does not appear that the requested interim order is outside the Board's jurisdiction or that the Board should defer to arbitration.

[29] The Board thus has jurisdiction to issue any interim order under section 19.1 of the *Code*, which authorizes it to exercise the functions set out in section 18.1 of the *Code*, for example, when the parties do not come to an agreement with respect to the determination of bargaining units and any questions arising from the review of the bargaining unit structure.

[30] The matter in *Air Canada, supra*, took place in a context where the Board had previously ruled on the need to review the relevant bargaining units, pursuant to section 18.1 of the *Code*, following the merger of Canadian Airlines International and Air Canada.

[31] In this matter, however, the Board has before it an application for review of the structure of the bargaining units, pursuant to section 18.1(1) of the *Code*, which reads as follows:

18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units **if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.**

(emphasis added)

[32] Before reviewing the structure of the bargaining units, pursuant to section 18.1(1), the Board must first be satisfied that the units are no longer appropriate for collective bargaining. If the Board is satisfied that the units are no longer appropriate for collective bargaining, it will proceed to the next step, that is, it will determine the structure of the bargaining units.

[33] Section 18.1(4) of the *Code* establishes the content of orders that the Board can issue in connection with a review of bargaining unit structures. However, that provision does not expressly refer to the power to suspend collective bargaining already underway at the time of the bargaining unit review.

[34] In this case, the Board has not previously ruled on the first issue, which is being challenged by the four bargaining agents, including the union in this matter. The Board has also not determined the appropriate structure for the bargaining units, where required.

[35] Consequently, this matter is not taking place in a context where the Board has to exercise responsibilities resulting from a decision it had previously issued pursuant to section 18.1 of *Code*.

[36] According to the Société, it is therefore appropriate for the Board to use an exceptional measure such as issuing an interim order pursuant to section 19.1 of the *Code*, because the Minister of Labour has chosen to impose on the parties a measure that she describes as "exceptional" (translation), by suspending the request for conciliation until the Board issued a decision on the application for review of the bargaining unit structures. The Board rejects that argument also. The conciliation procedures set out in sections 71 and following of the *Code* provide the Minister with different options under section 72(1), including refusing to appoint a conciliator. In this matter, the Minister decided to suspend the request for conciliation until the

Board issued a decision on the application for review filed by the Société. At the request of the union, which objected to the appointment of a conciliator, the Minister appointed two mediators pursuant to section 105 of the *Code*. The Board is of the view that the Minister's decision cannot have the effect of releasing the parties of the obligation to bargain collectively, where notice to bargain has been given pursuant to the *Code*.

[37] In *Canadian Helicopters Limited*, 2010 CIRB 532, the Board refused to issue an interim order to exempt the employer from the obligation under section 50 of *Code* to bargain collectively, on the grounds that no provision of the *Code* authorized it to do so. It stated the following:

[14] As pointed out by the union, section 50 of the *Code* imposes a strict obligation to commence collective bargaining once notice to bargain has been given. This provision contains mandatory language, and does not contemplate any exceptions. The Board is of the opinion that it does not have any authority to relieve a party of the statutory obligation to bargain set out in section 50 of the *Code*.

[15] Assuming, without deciding, that the Board does have such authority, the Board would not be inclined to exercise such authority in the circumstances of the instant case. The Board's discretion under section 19.1 of the *Code* is to be exercised for the purpose of ensuring the fulfilment of the *Code's* objectives. Those objectives, as set out in the Preamble, include extending support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices.

[38] The Board acknowledges that the decision in *Canadian Helicopters Limited*, *supra*, was issued in a different context. That decision, however, emphasizes the mandatory nature of the statutory obligation to bargain set out in section 50 of the *Code*.

[39] Although it is aware of the difficulties the parties are experiencing, the Board cannot conclude that an order to suspend bargaining would ensure, at this stage, the fulfilment of the objectives of Part I of the *Code*. The Board's mandate is to ensure the application of Part I of the *Code* in the light of its fundamental objectives. The Board must therefore encourage free collective bargaining and the constructive settlement of disputes.

[40] The other bargaining agents affected by the application for review of the units have already renewed their respective collective agreements with the employer. The union in this matter gave notice to bargain on May 30, 2012, pursuant to section 49 of the *Code*. The Board is of the view that exempting the employer of its obligation to bargain collectively with the union in this matter will create an undue imbalance in labour relations within the Société.

[41] Consequently, without limiting its discretionary power to issue interim orders under section 19.1 of the *Code*, the Board is of the view that the freedom to bargain collectively would be seriously compromised if it issued an interim order to suspend collective bargaining in the specific circumstances of this case.

[42] In light of the foregoing, the application for an interim order is dismissed. This decision does not prevent the parties from suspending collective bargaining by mutual agreement. In the absence of such an agreement, the Board encourages the parties to focus their efforts on renewing their collective agreement.

Translation

Louise Fecteau
Vice-Chairperson